RECORD
AND
BRIEFS

No. 15-1194

In the Supreme Court of the United States

LESTER GERARD PACKINGHAM,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

On Petition for Writ of Certiorari to the North Carolina Supreme Court

Brief *Amici Curiae* of Profs. Ashutosh Bhagwat, Richard Gárnett, Andrew Koppelman, Seth Kreimer, Lawrence Lessig, Sanford Levinson, Robert O'Neil, David Post, Lawrence Sager, Seana Shiffrin, Steven Shiffrin, Geoffrey Stone, Nadine Strossen, William Van Alstyne, and James Weinstein in Support of Petitioner

EUGENE VOLOKH
Counsel of Record
SCOTT & CYAN BANISTER
AMICUS BRIEF CLINIC
UCLA SCHOOL OF LAW
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu

Counsel for Amici Curiae

QUESTION PRESENTED

Whether a law banning convicted sex offenders who have served their sentences and are no longer on probation from accessing major social networking websites—such as Facebook, LinkedIn, and Twitter—leaves open ample alternative channels of communication.

TABLE OF CONTENTS

Question Presented i
Table of Contents ii
Table of Authorities iii
Interest of the *Amici Curiae* 1
Summary of Argument 3
Argument 4
I. This Case Offers This Court an Opportunity to Clarify the Jurisprudence Regarding "Ample Alternative Channels" 4
A. The North Carolina Statute Bars Access to Some of the Most Important Venues for Online Speech 4
B. The Lower Court's Analysis Is Inconsistent with This Court's Handling of Ample Alternative Channels in *City of Ladue* 9
II. This Case Would Let This Court Resolve a Disagreement Among Lower Court Decisions About How "Ample Alternative Channels" Should Be Understood 12
A. Many Circuit Court Decisions Have Applied the "Ample Alternative Channels" Requirement Rigorously 12
B. Other Court Decisions, Including the Decision Below, Treat Even Much Inferior Channels as "Ample Alternatives" 16
C. This Disagreement Merits This Court's Attention 18
Conclusion 19

TABLE OF AUTHORITIES

Cases

Bay Area Peace Navy v. *United States*, 914 F.2d 1224 (9th Cir. 1990) 13, 14, 16, 18

Bery v. *City of New York*, 97 F.3d 689 (2d Cir. 1996) 15, 18

Best Life Assur. Co. of California v. *C.I.R.*, 281 F.3d 828 (9th Cir. 2002) 16

Bose Corp. v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) 19

City of Ladue v. *Gilleo*, 512 U.S. 43 (1994) ..... *passim*

Cleveland Area Bd. of Realtors v. *City of Euclid*, 833 F. Supp. 1253 (N.D. Ohio 1993) 14

Cleveland Area Bd. of Realtors v. *City of Euclid*, 88 F.3d 382 (6th Cir. 1996) 14, 18

Gresham v. *Peterson*, 225 F.3d 899 (7th Cir. 2000) 13

Initiative & Referendum Institute v. *U.S. Postal Service*, 417 F.3d 1299 (D.C. Cir. 2005) 14, 15, 18

Jacobs v. *Clark County School Dist.*, 526 F.3d 419 (9th Cir. 2008) 16, 17, 18

Long Beach Area Peace Network v. *City of Long Beach*, 574 F.3d 1011 (9th Cir. 2008) 13

Marcavage v. *City of New York*, 689 F.3d 98 (2d Cir. 2012) 16, 17, 18

State v. *Packingham*, 777 S.E.2d 738 (N.C. 2015) (Pet. App.). 3, 7, 10

Tinker v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969) 17

Weinberg v. *City of Chicago*, 310 F.3d 1029 (7th Cir. 2002) 13, 17

Statutes

N.C.G.S. § 14-202.5 ..... *passim*

Other Authorities

Amy Mitchell et al., *Facebook Top Source for Political News Among Millennials*, PEW RESEARCH CENTER (2015), http://www.journalism.org/2015/06/01/facebook-top-source-for-political-news-among-millennials/ 7

Ashley Parker, *Facebook Expands in Politics, and Campaigns Find Much to Like*, N.Y. TIMES, July 29, 2015 ..... 5, 8

Boise, Idaho Police Dep't, https://www.facebook.com/BoisePoliceDepartment/ 9

Chattanooga, Tenn., https://www.facebook.com/Chattanooga.gov 9

Cruz Puts Twitter in Spotlight on Senate Floor, WALL ST. J., Mar. 7, 2013 9

Joanna Raines, *Ted Cruz Brings Twitterverse to Senate Floor for the First Time in History*, HOUS. CHRON., Mar. 7, 2013 9

Katie Hope, *Facebook Now Used by Half of World's Online Users*, BBC NEWS, July 29, 2015 5

Maeve Duggan et al., *Social Media Update 2014*, PEW RESEARCH CENTER (2015), http://www.pewinternet.org/files/2015/01/PI_SocialMediaUpdate20144.pdf 5, 6

Marc Fisher, *In Tunisia, Act of One Fruit Vendor Sparks Wave of Revolution Through Arab World*, WASH. POST, Mar. 16, 2011 8

Michael Scherer, *Friended: How the Obama Campaign Connected with Young Voters*, TIME MAG., Nov. 20, 2012 8

Montpelier, Vt., https://www.facebook.com/MontpelierVT/ 9

Sara Burnett, *GOP, Democrats Take Political Scrap Online*, DENVER POST, May 28, 2012 8

Sarah Halzack, *LinkedIn Has Changed the Way Businesses Hunt Talent*, WASH. POST, Aug. 4, 2013 6

Terms of Service, PINTEREST, https://about.pinterest.com/en/terms-service 6

User Agreement, LINKEDIN, https://www.linkedin.com/legal/user-agreement 6

INTEREST OF THE *AMICI CURIAE*[1]

Professor Ashutosh Bhagwat is the Martin Luther King, Jr. Professor of Law at the University of California Davis School of Law.

Professor Richard Garnett is the Paul J. Schierl/Fort Howard Corporation Professor of Law at the University of Notre Dame Law School.

Professor Andrew Koppelman is the John Paul Stevens Professor of Law at Northwestern School of Law.

Professor Seth Kreimer is the Kenneth W. Gemmill Professor of Law at the University of Pennsylvania Law School.

Professor Lawrence Lessig is the Roy L. Furman Professor of Law and Leadership at Harvard Law School.

Professor Sanford Levinson is the W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair in Law at University of Texas Law School.

Professor Robert O'Neil is an Emeritus Professor of Law at the University of Virginia School of Law and President Emeritus of the University of Virginia.

---

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. The parties' counsel of record received timely notice of the intent to file the brief under Rule 37. All parties have consented to the filing of the brief.

David Post is an Adjunct Scholar at the Cato Institute and a former Professor of Law at the Temple University Beasley School of Law (now retired).

Professor Lawrence Sager is the Alice Jane Drysdale Sheffield Regents Chair at the University of Texas School of Law.

Professor Seana Shiffrin is Professor of Philosophy and the Pete Kameron Professor of Law and Social Justice at UCLA School of Law.

Professor Steven Shiffrin is the Charles Frank Reavis Sr. Professor of Law, Emeritus at Cornell Law School.

Professor Geoffrey R. Stone is the Edward H. Levi Distinguished Service Professor of Law at the University of Chicago Law School.

Professor Nadine Strossen is the John Marshall Harlan II Professor of Law at New York Law School and the former President of the American Civil Liberties Union, 1991-2008.

Professor William Van Alstyne is the Lee Professor of Law Emeritus at the William & Mary Law School and the William R. and Thomas L. Perkins Professor Emeritus of Law at Duke University School of Law.

Professor James Weinstein is the Amelia Lewis Professor of Constitutional Law at the Arizona State University Sandra Day O'Connor College of Law.

Amici have written extensively on First Amendment issues. All are concerned that the decision below, and other circuit decisions identified in this brief

sharply deviate from this Court's precedent and risk eroding the rigor of this Court's "ample alternative channels" analysis. *Amici* believe that their perspective as scholars can be of help to this Court in evaluating the Petition for Certiorari.

SUMMARY OF ARGUMENT

N.C. Gen. Stat. Ann. § 14-202.5 bans convicted sex offenders from accessing a vast range of social networking sites—sites that have become indispensable places for speech about family life, politics, and religion. Yet the North Carolina Supreme Court upheld the law on the grounds that it supposedly left open "ample alternative channels." Pet. App. 18a.

True, the court acknowledged, the statute banned access to Facebook and the like. *Id.* at 19a. The dissent also noted that the statute banned access to LinkedIn, Instagram, Reddit, Myspace, and the *New York Times* Web site. *Id.* at 32a. But, the court argued, the statute left open access to other social networking websites:

- The Paula Deen Network, a site that lets registered users to swap recipes and discuss cooking techniques;
- WRAL.com, the site of a local TV station;
- Glassdoor.com, an online job searching tool;
- Shutterfly.com, a photo-sharing website.

Id. at 17a. This looks more like a parody of the "ample alternative channels" analysis than a serious application of that analysis.

Indeed, this government-friendly approach to the "ample alternative channels" inquiry is sharply inconsistent with this Court's most recent precedent on the matter, *City of Ladue* v. *Gilleo*, 512 U.S. 43 (1994). It is also inconsistent with circuit court cases that have taken seriously the requirements that the alternatives indeed be "ample." *See* Part II.A (discussing such cases from the Second, Sixth, Seventh, Ninth, and D.C. Circuits).

Unfortunately, though, the North Carolina court is not alone in interpreting the "ample alternative channels" prong so feebly. Perhaps because of the subjectivity of the term "ample," some federal circuit court cases have similarly departed from this Court's teachings in *City of Ladue*, and from the other circuit court decisions we cite above. *See* Part II.B. This Court ought to grant review to provide lower courts with more guidance about how demanding the "ample alternative channels" analysis should be.

ARGUMENT

I. This Case Offers This Court an Opportunity to Clarify the Jurisprudence Regarding "Ample Alternative Channels"

A. The North Carolina Statute Bars Access to Some of the Most Important Venues for Online Speech

Section 14-202.5 prohibits a registered sex offender from knowingly "access[ing]" any "commercial social networking Web site" (with narrow exceptions) that "permits minor[s]" "to become members or to create * * * personal Web pages." N.C.G.S. § 14-

202.5. This bars people from reading a vast range of speech, and sharply limits their ability to reach a vast potential audience with their own speech.

Packingham was convicted for accessing Facebook. As of 2014, 71% of online American adults used Facebook,[2] which amounted to 189 million monthly users.[3] The same year, Facebook had almost 1.5 billion users worldwide who accessed the site at least monthly, a number equal to half of the world's online users.[4]

Likewise, 28% of online adults in the United States use LinkedIn, another website covered by § 14-202.5.[5] LinkedIn is a prominent professional networking platform that lets users create profiles showing their professional background and connect with each other, recruiters, and businesses. Access to LinkedIn can significantly enhance a registered sex offender's chances of obtaining a job. A 2013 study found that 77% of employers used social media net-

---

[2] *See* Maeve Duggan et al., *Social Media Update 2014*, PEW RESEARCH CENTER (2015), http://www.pewinternet.org/files/2015/01/PI_SocialMediaUpdate20144.pdf.

[3] *See* Ashley Parker, *Facebook Expands in Politics, and Campaigns Find Much to Like*, N.Y. TIMES, July 29, 2015.

[4] See Katie Hope, *Facebook Now Used by Half of World's Online Users*, BBC NEWS, July 29, 2015.

[5] *See* Duggan, *supra* note 2.

works to recruit candidates.[6] Of those using social media, 94% said they used LinkedIn.[7]

An equal percentage of online U.S. adults (28%) reported using Pinterest, another social networking website designed to help users create a virtual bulletin board of clothing, art projects, furniture, and the like that the user finds interesting.[8] Each "pin" is linked to retail websites where the user can purchase whatever caught his eye.

Likewise, 26% of online U.S. adults reported using Instagram, another popular social media platform that allows users to post photos.[9] Another 23% of online adults use Twitter, which allows users to publish short items to readers who have subscribed to the user's Twitter account.[10] Section 14-202.5 bans access to all of these popular social media websites.[11]

---

[6] Sarah Halzack, *LinkedIn Has Changed the Way Businesses Hunt Talent*, WASH. POST, Aug. 4, 2013.

[7] *Id.*

[8] *See* Duggan, *supra* note 2.

[9] *See id.*

[10] *See id.*

[11] Like Facebook, LinkedIn, Pinterest, and Twitter are accessible to users under the age of 18 in the United States. *See User Agreement*, LINKEDIN, https://www.linkedin.com/legal/user-agreement (last visited Apr. 19, 2016) (minimum age 14); *Terms of Service*, PINTEREST, https://about.pinterest.com/en/terms-service (last visited Apr. 19, 2016) (minimum age 13); *Twitter Privacy Policy*, TWITTER, https://twitter.com/privacy (last visited Apr. 19, 2016) ("Our Services are not directed to persons under 13."). LinkedIn does not fall within

The statute thus criminalizes a wide variety of speech to and from the many tens of millions of Americans who make regular use of these sites.

And sites such as Facebook and Twitter have become a prominent and uniquely effective form of communication for which there is virtually no equivalent substitute. Facebook lets users as speakers communicate quickly and effectively with friends and family, sharing personal thoughts, political ideas, and news stories. According to a 2014 survey conducted by the Pew Research Center, 61% of millennials reported getting news about politics and government in the previous week from Facebook.[12]

Facebook also lets users as readers get a wide range of information that originates or first becomes widely spread on Facebook. To offer one especially famous example, in 2011, a video of Tunisian merchant Mohamed Bouazizi's self-immolation reached the world as it "hopped across hundreds of Facebook

---

the statutory exception for a site that "[h]as as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors," § 14-202.5(c)(2); people use LinkedIn to build professional networks, and not to directly engage in commercial transactions (the way that, for instance, Yelp and eBay are used for commercial transactions). *See* Pet. App. 33a (dissenting opinion) (noting that the statute "clearly includes" LinkedIn).

[12] Amy Mitchell et al., *Facebook Top Source for Political News Among Millennials*, PEW RESEARCH CENTER (2015), http://www.journalism.org/2015/06/01/facebook-top-source-for-political-news-among-millennials/.

pages," helping give rise to what came to be known as the Arab Spring.[13] Many such videos may remain available only on Facebook, without being copied to other sites. The North Carolina statute makes it a crime for sex offenders to even "access" Facebook. N.C. Gen. Stat. § 14-202.5(a).

Likewise, social media has become a staple of U.S. election campaigns. During the 2012 election, both the Republican National Committee and President Obama's re-election campaign created their own Facebook apps that let users get information about the campaign, interact with other candidate supporters, and even make phone calls on behalf of the candidate from the comfort of their own homes.[14] The Obama campaign also created a special app designed to target young swing-state voters.[15]

Other social media sites likewise let users engage with the political process. Senator Rand Paul, for instance, promoted his filibuster of the USA Patriot Act using Twitter.[16] Likewise, Senator Ted Cruz read

---

[13] Marc Fisher, *In Tunisia, Act of One Fruit Vendor Sparks Wave of Revolution Through Arab World*, WASH. POST, Mar. 16, 2011.

[14] Sara Burnett, *GOP, Democrats Take Political Scrap Online*, DENVER POST, May 28, 2012.

[15] Michael Scherer, *Friended: How the Obama Campaign Connected with Young Voters*, TIME MAG., Nov. 20, 2012.

[16] *See* Parker, *supra* note 3.

Twitter messages on the floor of the Senate in March 2013.[17]

Local governments and public officials are also establishing official Facebook pages for cities and city departments, recognizing the social media giant's power to grant them access to constituents at little or no cost.[18] Section 14-202.5 bars people from accessing any of this crucial information, much of which can only be found on Facebook or on other social media sites covered by the statute.

B. The Lower Court's Analysis Is Inconsistent with This Court's Handling of Ample Alternative Channels in *City of Ladue*

In *City of Ladue*, 512 U.S. at 45, this Court invalidated an ordinance that it treated as a total ban on homeowners displaying signs on their property. The ordinance, this Court concluded, did not leave open "adequate substitutes" for the important medium of speech that it foreclosed. *Id.* at 56.

The city argued that the ordinance left people "free to convey their desired messages by other

---

[17] *Cruz Puts Twitter in Spotlight on Senate Floor*, WALL ST. J., Mar. 7, 2013; *see also* Joanna Raines, *Ted Cruz Brings Twitterverse to Senate Floor for the First Time in History*, HOUS. CHRON., Mar. 7, 2013.

[18] *See, e.g.*, Boise, Idaho Police Dep't, https://www.facebook.com/BoisePoliceDepartment/ (last visited Apr. 18, 2016); Chattanooga, Tenn., https://www.facebook.com/Chattanooga.gov (last visited Apr. 18, 2016); Montpelier, Vt., https://www.facebook.com/MontpelierVT/ (last visited Apr. 18, 2016).

means, such as hand-held signs, 'letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings.'" *Id.* at 56 (citation omitted, italics deleted). But these alternatives, this Court held, were inadequate because they tended to convey a substantively different message, were not as cost-effective, or failed to reach the speaker's intended audience.

Section 14-202.5 similarly violates the First Amendment, because it does not leave open adequate alternative channels of communication. The court below erred in holding otherwise.

As alternatives, the court below suggested "the Paula Deen Network, a commercial social networking Web site that allows registered users to swap recipes and discuss cooking techniques"; the TV station website WRAL.com, a mainstream media outlet for news; "the commercial social networking Web site Glassdoor.com," which could potentially allow a sex offender to search for jobs online; and the web site Shutterfly, which lets people share photographs. Pet. App. 17a. The court further observed that the statute did not restrict "such methods of communication as text messages, FaceTime, electronic mail, traditional mail, and phone calls, which are not based on use of a Web site." *Id.* at 18a.

But these alternatives do not even come close to letting people express themselves as effectively as they can on Facebook, Twitter, and similar sites, or letting people read the material available on such sites. Like in *City of Ladue*, there is no adequate al-

ternative to the communicative impact of the forbidden social media.

Social media is "an unusually cheap and convenient form of communication," *City of Ladue*, 512 U.S. at 57, which lets people easily communicate with large audiences. *Id.* Many social media sites, including Facebook, Twitter, Pinterest, and Instagram, are free for ordinary users. And communicating through such sites is also extraordinarily convenient.

Facebook, for instance, makes it easy to share your posts on other social media pages. It automatically promotes your post to your friends; blogs do not. It lets friends easily comment on the posts. And it lets people communicate with their friends in a way that is not unduly intrusive. Someone who e-mails posts each day to hundreds of friends will soon find himself with many fewer friends; posting the same items on Facebook is much less distracting to recipients.

The Paula Deen Network and the other alternative sites proposed by the court below fall far short of reaching the kind of audience that Facebook or Twitter are able to reach. To reach your friends and acquaintances through a social media site, they need to be on that site; many fewer people are on the Paula Deen Network than on Facebook. As in *City of Ladue*, the restriction interferes with a speaker's ability to reach "an audience that could not be reached nearly as well by other means." *Id.*

And the alternatives offered by the court below also interfere with people's ability to read the content they want to read. The personal, political, and reli-

gious content a user seeks to access by using Facebook cannot be found on a recipe website.

As this Court made clear in *City of Ladue*, the mere fact that alternate methods of communication exist does not mean that these channels are "ample alternative channels," which is to say "adequate substitutes" for the channels that are forbidden. *Id.* at 56-57. And there is no adequate substitute for the social media giants foreclosed by § 14-202.5. The decision of the court below cannot be reconciled with this Court's ruling in *City of Ladue*.

II. This Case Would Let This Court Resolve a Disagreement Among Lower Court Decisions About How "Ample Alternative Channels" Should Be Understood

The North Carolina court's weak reading of the "ample alternative channels" requirement is a symptom of a broader problem: Lower court decisions have split on how this requirement should be understood.

A. Many Circuit Court Decisions Have Applied the "Ample Alternative Channels" Requirement Rigorously

Many circuit court decisions rigorously analyze whether the proposed alternative channels are ample (or adequate), and conclude that they are not ample or adequate if they do not let speakers reach substantially the same audience. For example:

1. The Seventh Circuit has expressly stated that an alternative channel "is not adequate if it 'foreclose[s] a speaker's ability to reach one audience even if it allows the speaker to reach other groups.'" *Wein-*

berg v. *City of Chicago*, 310 F.3d 1029, 1041 (7th Cir. 2002) (quoting *Gresham* v. *Peterson*, 225 F.3d 899, 907 (7th Cir. 2000)). Because of this, the Seventh Circuit struck down a Chicago ordinance that banned selling merchandise—such as books—on certain city sidewalks, including in front of the Chicago Blackhawks hockey stadium. The ban, the court held, failed to leave open "ample alternative channels" for communication, because the plaintiff's intended audience consisted of Blackhawks fans, and selling plaintiff's book online, at bookstores, or in other areas of the city would not as effectively reach that audience. *Id.* at 1041, 1042.

2. The Ninth Circuit has likewise concluded that "an alternative is not ample if the speaker is not permitted to reach the intended audience." *Bay Area Peace Navy* v. *United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) (reaffirmed after *City of Ladue* in *Long Beach Area Peace Network* v. *City of Long Beach*, 574 F.3d 1011, 1025, 1038 (9th Cir. 2008)). In *Bay Area Peace Navy*, the government established a 75 yard "security zone" around Aquatic Park Pier in which only invited guests were allowed during "Fleet Week," an event that included a naval vessel parade. *Id.* at 1225-26. The Peace Navy, which used small boats for an anti-war counter-demonstration during Fleet Week, challenged the security zone on First Amendment grounds. *Id.* at 1226-27.

The Ninth Circuit found that the zone around the pier did not leave the Peace Navy with ample alternative channels of communication, because it kept the Peace Navy's message from reaching the government's invited guests on the pier. *Id.* at 1230. The al-

ternatives of "passing out pamphlets on land or demonstrating at the entrance to the pier," the court concluded, were inadequate, because the invited guests could not see any message conveyed from those positions. *Id.* at 1229.

3. In *Cleveland Area Bd. of Realtors* v. *City of Euclid*, 88 F.3d 382 (6th Cir. 1996), the Sixth Circuit struck down a city ordinance that largely limited signs in residential neighborhoods to three or four square feet, and required that they be placed in windows rather than on lawns. *Id.* at 383-84. The court treated the ordinance as content-neutral, but concluded that it did not leave open ample alternative channels for communication. *Id.* at 387-88, 390.

The proffered alternatives—such as the use of real estate agents, newspaper advertisements, or window signs—were inadequate, the court held. Real estate agents were "considerably more expensive" than "for sale" yard signs. *Id.* at 390. Window signs were "'completely ineffective,'" *id.* (quoting the district court decision), and thus "greatly restrict a speaker's audience." *Id.* (The court presumably concluded that window signs were ineffective because they were so hard to see, the reason given by the district court decision. *Cleveland Area Bd. of Realtors* v. *City of Euclid*, 833 F. Supp. 1253, 1260 (N.D. Ohio 1993).).

4. In *Initiative & Referendum Institute* v. *U.S. Postal Service*, 417 F.3d 1299 (D.C. Cir. 2005), the D.C. Circuit held that a regulation banning "soliciting signatures on petitions, polls, or surveys" on all postal service property would be unconstitutional as to exterior sidewalks that were traditional public fo-

ra. *Id.* at 1303, 1314. The regulation, the court concluded, failed to leave open "ample alternative channels" for communication, *id.* at 1302, 1312—the ban on signature solicitation significantly "'limit[ed] the size of the audience'" a person could reach, *id.* at 1312 (citation omitted).

5. In *Bery* v. *City of New York*, 97 F.3d 689 (2d Cir. 1996), the Second Circuit struck down a provision of New York City's administrative code that "bar[red] visual artists from exhibiting, selling or offering their work for sale in public places in New York City without first obtaining a general vendors license." *Id.* at 691. The ordinance, the court held, failed to leave open ample alternative channels of communication. *Id.* at 698.

Though the city argued that the plaintiffs could sell their artwork from their homes or from galleries or museums, *id.*, the court concluded that displaying art on the street reached a different audience (people who do not attend galleries or museums). *Id.* at 698. "Appellants are interested in attracting and communicating with the man or woman on the street who may never have been to a gallery and indeed who might never have thought before of possessing a piece of art until induced to do so on seeing [plaintiffs'] works." *Id.* "The sidewalks of the City must be available for [plaintiffs] to reach their public audience." *Id.*

B. Other Court Decisions, Including the Decision Below, Treat Even Much Inferior Channels as "Ample Alternatives"

Other court decisions, on the other hand, have departed from the principles of *City of Ladue* and of the circuit decisions discussed above, by concluding that ample alternative channels exist even when the alternatives block speakers from reaching much of their target audiences.

1. In *Marcavage* v. *City of New York*, 689 F.3d 98 (2d Cir. 2012), the city relegated protesters at the 2004 Republican National Convention to a demonstration zone that "was not within 'sight and sound' of the intended audience" of convention delegates. *Id.* at 102, 108. The Second Circuit held that this zone was an "ample alternative" to demonstrating in front of the Convention, even though the protesters were placed too far for the delegates to hear. The court specifically rejected the analysis of the Ninth Circuit in *Bay Area Peace Navy*, noting that the Ninth Circuit's decision was "not persuasive," and was "a split decision from another circuit." *Id.* at 108 n.2.[19]

---

[19] The Second Circuit also concluded that the *Bay Area Peace Navy* ample alternative analysis was "dictum," because the Ninth Circuit had also concluded that "the speech restriction was not narrowly tailored." *Marcavage*, 689 F.3d at 108 n.2. But the Ninth Circuit has held that alternative holdings are not dictum. *See Best Life Assur. Co. of California* v. *C.I.R.*, 281 F.3d 828, 833 (9th Cir. 2002). And the *Bay Area Peace Navy* ample alternative channels analysis was an example of such an alternative holding. The Ninth Circuit concluded that the gov-

2. In *Jacobs* v. *Clark County School Dist.*, 526 F.3d 419 (9th Cir. 2008), the Ninth Circuit upheld school uniform policies that prohibited students from displaying printed messages on their school clothing. *Id.* at 422-27, 437. In *Jacobs*, the Ninth Circuit did not apply any special rule for schools, for instance the rule of *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). Instead, the court applied the normal intermediate scrutiny standard applicable to "law[s] restricting speech on a viewpoint- and content-neutral basis" outside school. *Jacobs*, 526 F.3d at 429-34.

And the restriction, the court concluded, left open ample alternative channels: students could still express themselves via "verbal conversations," through the school newspaper, by joining student clubs, and by wearing whatever they wanted after school and on weekends. *Id.* at 437. Yet the clothes one wears outside school cannot reach the same audience that one has in school. Likewise, one can only have verbal conversations with a few people; a T-shirt can be seen by many more. And many students who do not read the school newspaper or join student clubs can still see messages on T-shirts.

3. As Part I noted, the North Carolina Supreme Court's opinion applies the "ample alternative chan-

---

ernment-established 75-yard "security zone" in question was not narrowly tailored, but "also agree[d]" with the district court that this security zone did not leave open ample alternative channels for communication. *Bay Area Peace Navy*, 914 F.3d at 1228-30.

nels" prong in an even more government-friendly manner than do *Marcavage* and *Jacobs*.

All these cases would have come out differently under the analysis of the cases discussed in Part II.A. The restrictions upheld in *Marcavage*, *Jacobs*, and the decision below "'foreclose[d] a speaker's ability to reach [his chosen] audience,'" *Weinberg*, 310 F.3d at 1041 (citation omitted). They did "not permit[the speaker] to reach the 'intended audience,'" *Bay Area Peace Navy*, 914 F.2d at 1229. They "greatly restrict[ed] a speaker's audience," *Cleveland Area Bd. of Realtors*, 88 F.3d at 390. They significantly "'limit[ed] the size of the audience'" a person could reach, *Initiative & Referendum Institute*, 417 F.3d at 1312 (citation omitted). And they failed to allow the speakers "to reach their public audience," *Bery*, 97 F.3d at 698.

C. This Disagreement Merits This Court's Attention

The head count of the positions taken by these courts is complicated. The Sixth, Seventh, and D.C. Circuits hold that alternative channels are ample only if they let a speaker reach essentially the same audience. The North Carolina Supreme Court holds that they are ample even when they reduce the speaker to a tiny fraction of his potential audience. And the Second and Ninth Circuits have precedents going both directions, without confronting the disagreements among the precedents. (The Second Circuit's speech-restrictive *Marcavage* decision does not discuss the speech-protective ample alternative channels analysis in *Bery*, and the Ninth Circuit's

speech-restrictive *Jacobs* decision does not discuss the speech-protective ample alternative channels analysis in *Bay Area Peace Navy*.)

But the disagreements both among and within circuits reflect the need for this Court to step in. The "ample alternative channels" test is, understandably, not self-defining. When "the meaning of [such] concepts cannot be adequately expressed in a simple statement," and yet such concepts are of constitutional significance, "this Court's role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance." *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 503 (1984). Inconsistent interpretations of this Court's precedents, such as in the lower court decisions identified in this Part, signal that it is time for this Court to offer more benchmarks for lower courts to follow in this important area of First Amendment law.

CONCLUSION

The court below essentially refused to apply the "ample alternative channels" requirement in any meaningful way. In this respect, its decision was an extreme version of some circuit court decisions, and inconsistent with other circuit court decisions and with this Court's decision in *City of Ladue*. This Court should grant certiorari and remind lower courts that the "ample alternative channels" requirement should be robustly applied.

Respectfully submitted,

EUGENE VOLOKH
Counsel of Record
SCOTT & CYAN BANISTER
AMICUS BRIEF CLINIC
UCLA SCHOOL OF LAW
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu

Counsel for Amici Curiae